84-824

No.

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: November 21, 1984

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC - 223-1220

QUESTIONS PRESENTED FOR REVIEW

Whether the Federal Communications Commission has exceeded its Legislative grant of authority in imposing an "end user access charge" and as such has acted in an *ultra vires* manner.

Whether the Federal Communications Commission has, for the convenience of administration, violated the universal service mandates of the Communications Act in establishing without cost justification and in violation of 47 U.S.C. § 202, a discriminatory local rate depriving local ratepayers of equal protection of the law.

PARTIES

The parties to the proceeding before the U.S. Court of Appeals for the District of Columbia Circuit are listed below.

Petitioners and intervenors supporting petitioners were as follows:

National Association of Regulatory Commissioners;
Public Service Commission of the District of Columbia;
People of the State of California and the Public Utilities Commission of the State of California;
MCI Telecommunications Corporation;
Lexitel Corporation;
Western Union Telegraph Company;
North American Telecommunications Association;
Aeronautical Radio, Inc.;
United States Transmission Systems, Inc.;
Telesphere Network, Inc.;
Association of Long Distance Telephone Companies;
Iowa State Commerce Commission;
Washington Utilities and Transportation Commission;
Rural Telephone Coalition;
New York State Department of Public Service;
Roseville Telephone Company, *et al.*;
National Association of State Utility Consumer Advocates;
Maryland Office of People's Counsel;
Florida Public Service Commission;
Steven W. Hamm, as Consumer Advocate for the State of South Carolina;
Vermont Public Service Board;
Arizona Corporation Commission;
Public Service Commission of Wisconsin;
Public Service Commission of West Virginia;

State of Alaska, *et al.*;
Public Service Commission of Alabama;
Department of Public Utility Control of the State of Connecticut;
South Dakota Public Utilities Commission;
Missouri Public Service Commission;
State of Michigan, *et al.*;
American Petroleum Institute;
Association of Data Communications Users;
Utilities Telecommunications Council;
GTE Sprint Communications Corporation;
Satelco, Inc.;
Teletec Serving Communications Company;
U.S. Telephone, Inc.;
U.S. Transmission Systems, Inc.;
Tel Systems Management Corporation; and
GTE Service Corporation.

Respondents and intervenors supporting respondents were as follows:

Federal Communications Commission;
United States of America;
International Business Machines Corporation;
Bell System Operating Companies, *et al.*;
American Telephone & Telegraph Company;
MCI Telecommunications Corporation;
Rochester Telephone Corporation;
United States Telephone Association;
ROLM Corporation;
Ad Hoc Telecommunications Users Committee; and
Association of Data Processing Service Organizations.

The following parties were granted intervenor status but did not file briefs. Their positions are not known to Petitioner:

Centel Corporation;
United Telephone Systems, Inc.;
American Broadcasting Companies, Inc.;
Illinois Commerce Commission;
Combined Network, Inc.;
Enhanced Communication Services Association; and
Allnet Communications Services, Inc.

Petitioner, Florida Public Service Commission (FPSC), is a state regulatory agency created under Chapter 350, Florida Statutes. The FPSC is charged by state law to regulate the rates, tolls and charges of various industries pursuant to specific statutory authority. The FPSC has authority under Chapter 364, Florida Statutes, to regulate the intrastate rates, tolls and charges of investor owned telephone companies operating within the State of Florida. The FPSC is the appropriate state agency to represent the State in matters dealing with the regulation of telephone companies. Section 364.01, Florida Statutes (1983).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Florida Public Service Commission (FPSC) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 12, 1984. Reconsideration was sought and disposed of by the Circuit Court of Appeals for the District of Columbia Circuit on August 23, 1984. *National Association of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095 (D.C. Cir. 1984).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia is reported at 737 F.2d 1095

(D.C. Cir. 1984). The Federal Communications Commission's *Access Charge Order* is reported at 93 F.C.C.2d 241 (1983). Its order on initial reconsideration is reported at 48 Fed. Reg. 42,984 (1983). Its order on further reconsideration is reported at 49 Fed. Reg. 7,810 (1984).

JURISDICTION

The decision of the District of Columbia Circuit was entered on June 12, 1984. Reconsideration was sought and disposed of by the Circuit Court of Appeals for the District of Columbia Circuit on August 23, 1984. This petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Relevant United States Code provisions are set out in Appendix A, and relevant Florida statutory authority is set out in Appendix B.

STATEMENT OF THE CASE

The controversy has arisen because, over the years, many costs associated with the provision of local telephone services had been subsidized by the rates charged for long distance services.

The Federal Communications Commission (FCC or Commission) first undertook to try and apportion costs associated with the provision of local and long distance services. It sought to separate those local costs, which had been traditionally recovered through interstate usage-sensitive toll rates. Finally, the Commission, for ease of administration, designed a flat rate increase to all subscribers of local

service without regard to the costs associated with the provision of like communications services. The FCC intruded upon the regulatory jurisdiction of the States in imposing a rate increase for local service which on its face is unjustifiably discriminatory and in violation of the customers' equal protection rights. At issue here is a jurisdictional question as to who has the authority to design a rate structure for the recovery of these local costs.

Before 1930, in many jurisdictions, all local exchange plant costs were paid by local subscribers and were included in their local rates. Local telephone companies did not receive any reimbursement from AT&T or long-distance customers for the origination and termination of their interstate calls.

However, this changed after 1930 when this Court decided *Smith v. Illinois Bell Telephone*, 282 U.S. 133 (1930). After *Smith*, a portion of these costs was allocated to the interstate jurisdiction. The basic "settlements" and "division of revenues"[1] process was in effect when the FCC initiated the CC Docket No. 78-72 rulemaking proceeding at issue here. Docket No. 78-72 originated February, 1978 with the issuance by the FCC of a *Notice of Inquiry and Proposed Rulemaking*, 67 F.C.C.2d 757 (1978), designed to determine the MTS/WATS[2] market structure that would best serve the public interest. In its

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[1]"Settlements" refer to the method used by AT&T and the independent local telephone companies. "Division of revenues" refers to the method used within the AT&T corporate family.

[2]MTS is the FCC's name for standard long-distance telephone service. WATS provides a subscriber with access from his line to all phones in each of several geographic zones. 800 Service (formerly Inward WATS) enables him to receive long-distance telephone calls without the caller being charged. Outward WATS enables him to place long distance telephone calls for less than standard long-distance rates.

Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 F.C.C.2d 177 (1980), the FCC concluded that a general policy of open entry in the MTS/WATS market would be in the public interest. In light of this conclusion, the Commission determined that future proceedings in Docket No. 78-72 would be confined to a determination of how local telephone companies should be compensated for the use of their facilities to complete interstate communications.

In response to comments received on its tentative proposals, the FCC, on February 28, 1983, issued its *Third Report and Order,* 93 F.C.C.2d 241 (1983) (*Access Charge Order*). In this order the Commission stated that in deciding upon a compensation plan, it sought to accommodate four potentially conflicting goals. The four objectives identified by the FCC were "the prevention of uneconomic bypass;"[3] "the elimination of unjust discrimination or unlawful preferential rates;"[4] "the encouragement of network efficiency;" and, "the continued assurance of universal service."[5] *Access Charge Order,* para. 122, 93

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[3]Bypass is the term used to describe what occurs when end users employ alternative technologies to take the place of the local exchange telephone system. The FCC feared and sought to avoid uneconomic bypass. Uneconomic bypass occurs when alternative technologies are cheaper to use only because use of the local exchange system is priced above cost. *NARUC v. F.C.C., supra,* at 1108.

[4]Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a), makes unlawful any "unjust or unreasonable discrimination in charges. . ." and "any undue or unreasonable preference or advantage to any particular person. . . ."

[5]Section 151 of the Communications Act of 1934, 47 U.S.C. § 151, required the FCC to "regulate interstate . . . commerce in communication . . . so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide and worldwide . . . communication service with adequate facilities at reasonable charges."

F.C.C.2d at 278. The FCC determined that its various goals could be accomplished best by moving toward a system in which virtually all costs associated with the local loop were recovered from end users through monthly flat-rate access charges.

The FCC has twice reconsidered its *Access Charge Order* and the compensation scheme embodied in that order. In its *Memorandum Opinion and Order on Reconsideration,* issued August 22, 1983, 48 Feb. Reg. 42,984 (*Reconsideration Order*), the FCC altered several aspects of its prior decision, including the level of end user access charges. In its *Memorandum Opinion and Order on Further Reconsideration,* issued February 15, 1984, 49 Fed. Reg. 7,810 (*Further Reconsideration Order),* the Commission again modified several important aspects of its prior scheme, including the level and timing of end user access charges. More specifically, the FCC deferred end user charges for residential and single-line business customers until June, 1985[6] and capped these charges at $4 per month through 1990.[7] However, the FCC throughout its reconsideration proceedings, reaffirmed its conclusion that end user access charges should ultimately be imposed as the means to recover the bulk of NTS costs previously allocated to the interstate jurisdiction.

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[6]Multi-line business access charges, beginning at $6 per month, remained unaltered by the FCC's reconsideration orders. These charges were implemented on May 25, 1984.

[7]The FCC has also instituted further decision-making on several matters: the amount of end user charges after 1990; exemptions from access charges for low income subscribers; the timing of increases in end user charges; and, mechanisms to fulfill the particular needs of small telephone companies in high cost areas. *Further Reconsideration Order,* paras. 15-26, 49 Fed. Reg. 7,812-13.

The NARUC filed its petition for review [Docket No. 83-1225] pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(i) in the U.S. Court of Appeals for the District of Columbia Circuit on March 1, 1983, after the FCC released its *Third Report and Order.*

The Florida Public Service Commission intervened in Case Nos. 83-1225 and 83-1329. The FPSC alleged:

> IX. THE FCC's END USER ACCESS CHARGE VIOLATES THE UNIVERSAL SERVICE MANDATE OF THE COMMUNICATIONS ACT.
>
> A. The universal service mandate requires that FCC action promote the economic availability of telephone service to the greatest number of Americans.
>
> B. The record below does not support adoption of an end-user charge as the least burdensome means to promote universal service.
>
> C. The determinations made by the District Court in the AT&T divestiture proceeding collaterally establish that the end-user charge is antithetical to universal service.
>
> X. THE INTERSTATE END-USER ACCESS CHARGE VIOLATES ESSENTIAL PRINCIPLES OF JURISDICTIONAL SEPARATIONS ENUNCIATED IN *SMITH V. ILLINOIS BELL TELEPHONE COMPANY* AND EMBODIED IN THE JURISDICTIONAL PROVISION OF THE COMMUNICATIONS ACT.
>
> A. An interstate end-user access charge is prohibited under *Smith v. Illinois Bell Telephone Company.*
>
> B. An interstate end-user access charge consti-

tutes a local rate which is beyond the jurisdictional ambit of the FCC.

The Circuit Court affirmed the decision of the FCC in most major aspects. Reconsideration was filed and disposed of, *NARUC v. F.C.C., supra,* and this Petition ensued.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL COMMUNICATIONS COMMISSION HAS EXCEEDED ITS LEGISLATIVE GRANT OF AUTHORITY IN IMPOSING AN "END USER ACCESS CHARGE" AND AS SUCH HAS ACTED IN AN *ULTRA VIRES* MANNER.

The Federal Communications Commission exceeded its legislative grant of authority by imposing an across the board flat rate end user charge on all subscribers of local service. By such action, the Commission has acted in an *ultra vires* manner under the guise of characterizing what is really a local rate as a component of long distance interstate charges. The authority to set local rates is reserved to the states under the Communications Act of 1934 and the Commission has intruded upon that authority by imposing an end user charge.

Overview of Rate Making

In order to demonstrate how the Commission exceeded its authority and how it departed from the methods of ratemaking recognized by this Court in *Smith v. Illinois Bell Telephone, supra,* it is helpful to review the basic procedures followed in the setting of rates.

Within any jurisdiction, state or federal, a regulated

business must establish several things in order to justify a change in rates. It must first prove its investment (the amount of the investment and that the investment was prudently incurred). It must then establish its cost of operation (operating and maintenance expenses including taxes and depreciation) and what it believes investors expect as a return for their investing and bearing the financial and business risks associated with that investment. From this data, the regulatory agency computes a revenue requirement for the Company. A revenue requirement is an estimate of the amount of gross income which would compensate the utility for its prudent costs or expenses (including debt service) and produce sufficient dollars to satisfy the needs associated with attracting and keeping equity investors. Once this revenue requirement has been established, the agency has completed the first step in its process.

The second step begins with the agency gathering data on projected usages of each type of telephone service. Then, by balancing the costs of service and the value of such services, the agency goes about allocating this revenue requirement through the rates to be charged to various customers. This second step is generally termed the exercise of the agency's "rate structure jurisdiction." In determining the shape or the structure of rates, agencies are guided in their development by the projections of usage, by the elasticity of the demand for the service, the effects that rate increases will have on that demand and, finally, by social and economic considerations, such as the value of service to customer classes, the costs of providing that service and the number of phones accessed.

The system seems straight-forward enough, and it would be if the companies' activities were exclusively within the province of one jurisdiction. Generally, the

complexity of providing utility services prevents this simple situation. Telephone companies must, of necessity , provide both intrastate and interstate calling services. Electric utilities are tied into wholesale and retail sales and interstate transmission and sale of excess capacity. Each activity has a jurisdictional forum in which regulatory oversight and rate making is carried out. The difficulty in carrying out these regulatory functions is further complicated by the fact that some of the facilities used in the provision of service within one jurisdiction are also used for the provision of service in another jurisdiction. These "joint" facilities have to be equitably divided and allocated between the regulatory jurisdictions. The rates set, based upon that division, must assure that the rate bases upon which a utility earns and expenses allocated to the provision of that service, adequately compensate the utililty for the total plant used and useful in the provision of utility services.

So, into the regulatory scheme an additional step is added. *Before* a regulatory agency undertakes rate making, there must be a division of costs for joint facilities and an allocation of those costs to the appropriate jurisdiction. An agency, in this case the FCC, prepares a jurisdictional separation of plant and an assignment of the plant and associated expenses to the jurisdiction having the authority for setting rates to recover those costs from the ultimate ratepayers.

Jurisdictional Separation — Effect of Smith Decision

The separation of plant between jurisdictions was the underlying concern in the *Smith* case. In *Smith,* the state commission set rates without regard to a division of the Company's assets along jurisdictional lines. The state commission and the District Court that reviewed the order

both agreed that intrastate and interstate calls were made using the same equipment. However, the state commission "made no specific findings based on a separation of the intrastate and interstate property, revenues and expenses. Rather, the state commission determined the issue on the basis of the total Chicago property of the company." *Id.* at 147.

This Court held that:

> The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. *It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.* . . .
>
> . . . *The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this cannot be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority.* In view of the questions presented in this case, *the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed.* (emphasis supplied).

Clearly, before rate setting can begin, a proper allocation of assets and expenses must be made between jurisdictions in order to ensure that the rates set by the federal and state jurisdictions properly reflect the costs and assets of providing service.

The FCC Has Intruded Upon State Authority To Set Local Rates

In this case, the Commission properly recognized that its jurisdiction could be exercised to determine the appropriate separations of investment and expenses between jurisdictions. However, the Commission exceeded its authority by designing a rate structure for the recovery of the intrastate revenue requirement. In order to compensate for its lack of jurisdiction, the Commission created a fiction that the end user access charge was an interstate rate.

The Commission decided that non-traffic sensitive (NTS) costs associated with the local loop, previously allocated to interstate toll, should be borne instead entirely by the local subscriber. In effect, the Commission reallocated the NTS cost from interstate to local.

In defining end user access charges as a component of interstate communications, the Commission intentionally ignores the controlling fact that if a subscriber never uses the interstate network he must still pay an end user access charge. Stated another way, a person who simply subscribes for local exchange service must pay the end user access charge. The end user access charge is thus a local rate within the jurisdiction of the state regulatory agency's authority to design pursuant to its rate structure jurisdiction.[8] What the FCC has engaged in is "administrative legislation." The Commission has taken upon itself the role of redefining its jurisdiction to limit the jurisdiction of the individual states in matters of rate structure for local rates. Jurisdiction over intrastate activities is expressly reserved to the state in section 47 U.S.C. §§ 152(b) & 221(b), while the Commission has authority over interstate

[8] In Florida, this authority is found in §§ 364.03, *et seq.* (1983).

and international communications pursuant to 47 U.S.C. § 151. As long as the FCC contents itself with separating costs between jurisdictions and reserves to the States the right to allocate those costs through state rate setting, the Commission has not exceeded its authority.

Nature Of Costs Involved

In American Telephone and Telegraph Company's Brief in Opposition to the Petition for Writ of Certiorari filed in this Court in Case 84-95, AT&T alleges "[i]n this case, the fixed end user charges adopted by the FCC are *interstate* rates limited to recovering costs assigned to *interstate* jurisdiction" (*Brief* at 8). At the same time, in testimony before the Florida Public Service Commission, on September 25 and 26, 1984, in Docket No. 820537-TP, witnesses for AT&T Communications stated the converse.

Dr. John T. Wenders,[9] called on behalf of AT&T Communications in response to questions posed by Commissioner Joseph P. Cresse, stated:

> A You're talking about a carrier or an end user now?
>
> Q From an end user's perspective, what are NTS costs to that person?
>
> A They are local costs.
>
> Q Are they a cost merely of access to the local network?
>
> A Yes, sir, mostly.

---

[9]Dr. Wenders is a Professor of Economics at the University of Idaho. He was testifying on behalf of the AT&T of the Southern States, Inc., in Docket No. 820537-TP. In the Matter of Intrastate Telephone Access Charges for Toll Use of Local Exchange Services at 1194-1195.

Q You said most of them. Where is the split?

A Well, there are some in the switching equipment that are dedicated nontraffic-sensitive costs in the switching equipment that could not properly be termed part of the loop, I suppose. We may be quibbling about words.

Q Is the perception of the end user, for example the residential customer, relevant to this Commission's considerations as to how these costs should be priced?

A Well, obviously, the Commission, as Mr. Cresse indicated, the Commission feels pressures. They have political pressures on them, and I would be a fool to admit that those things didn't exist there. *The thing that bothers me about it is that we have fostered among local users somehow the fiction that local rates are covering their costs and we all know they're not. And so that their perception of so-called CALC*[10] *is that it is something that has something to do with toll. It really doesn't. That's only the way the FCC did it. Because of the separations problem that transferred those costs artificially from local to toll, then the FCC is putting them back on local. Somehow the customer has the perception that they're coming from the FCC. That's not true.* (emphasis supplied).

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[10]N.B.: CALC is an acronym for "Customer Access Line Charge" and is synonymous with the flat end user fee. Brief of Mountain States Telephone Company and Pacific Northwest Bell Telephone Company in Case No. 84-95, *NARUC v. F.C.C.* on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 3.

In further testimony, also in response to Commissioner Cresse's questioning, Lawrence R. Weber, Regional Vice President, called on behalf of AT&T Communications of the Southern States, Inc., (at 977-978), stated:

> COMMISSIONER CRESSE: The second thing I want to ask you, do you think there is any difference between a CALC and an increase in local rates?
>
> WITNESS WEBER: No, sir. I think an increase in local rates is preferable, personally. I think we ought to deal with separations problems, which is what we are dealing with. A CALC, I think the CALC came about because of a failure of the joint board over the years to move and –
>
> COMMISSIONER CRESSE: For all practical purposes, it is an increase in local rates, isn't it?
>
> WITNESS WEBER: It amounts to the same thing to the guy that is paying it.
>
> COMMISSIONER CRESSE: Thank you, sir. (at 1095).

Effect Of FCC *Ultra Vires* Action

It is obvious from this testimony that the CALC or end user access charge is nothing more than an increase in local rates. Furthermore, it has no relationship to actual costs nor has the FCC tried to tie it to actual costs. The FCC has allocated what are local costs back to the local customers and then specifically set the form for charges to recover those costs without regard to its lack of jurisdiction over local rates.

This Court must act to limit the unbridled extension of the FCC authority into traditional state rate regulation.

> Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.[11]

As a policy matter, the issue presented for consideration by this Court is of significant social interest. State regulatory authorities are governed by public interest standards set by state legislatures to govern the design of rates. These interests primarily concern local differences in classifications of customers and considerations unique to states. State agencies design rate strucures tailored to local costs and usages. There is no overriding federal policy governing local rate structure issues.

The argument has been raised that the function of the end user access charge is to allocate the cost to the cost causer. American Telephone and Telegraph Company in their Brief in Opposition to the Petition for Writ of Certiorari filed by the National Association of Regulatory Utility Commissioners, Case No. 84-95, states:

> Under the FCC's new plan, the non-traffic sensitive customer line costs assigned to the FCC's jurisdiction will be recovered in part from telephone customers through flat monthly charges, *thus ensuring that the interstate costs of a customer's line are borne by the actual cost causer.* At 3. (emphasis supplied).

The test being employed by state regulatory agencies in trying to allocate cost causation is the allocation of the costs to the customer who uses the service.

---

[11] *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38 (1936).

The Circuit Court, citing from the *Access Charge Order,* para 121, 93 F.C.C. at 278, further iterated:

> "A subscriber who does not use the subscriber line to place or receive calls imposes the same NTS (non traffic sensitive) costs as a subscriber who does use the line." The Court added, "It should be the main rule, the FCC decided, that subscribers bear responsibility for the *local telephone network costs they actually cause."* (emphasis supplied).

NARUC v. F.C.C., supra, at 1108.

Once the FCC decided upon the costs associated with the "local telephone network costs," it was then within the jurisdiction of the state regulatory agencies to design rate structures for the recovery of those costs. The Circuit Court has in effect legalized an *ultra vires* exercise of administration prerogative absent any applicable statutory authority. The argument proceeds that although these are local telephone network costs, to be collected from all local ratepayers, regardless of the fact that a ratepayer *never* uses the interstate network, and the funds will be received by the local companies to support local plant, the Commission and the Court avow that these are interstate rates.

The Commission in its order, *Access Charge Order,* paras. 37-41, *Section 201(a) Authority*, predicates its imposition of a local rate on the fact that the access charge is to compensate for disparities in the division of revenues. The disparity, the Commission alleges, is that certain NTS costs of the local exchange company which are associated with the provision of long distance (interstate) service, have been traditionally recovered through the separations process. Now it determines that these charges should be assessed uniformly from the local ratepayer.

This is a mischaracterization of the nature of the costs involved. The costs are local costs to be recovered through local rates. The FCC has intruded into traditional state rate making in excess of its legislative grant of authority. This Court should take jurisdiction.

II.

THE FCC'S ACCESS CHARGE VIOLATES THE UNIVERSAL SERVICE MANDATES OF THE COMMUNICATIONS ACT IN IMPOSING A BURDENSOME, DISCRIMINATORY RATE FOR THE CONVENIENCE OF AGENCY ADMINISTRATION.

The Commission's action in authorizing a uniform end user access charge was arbitrary and capricious and, therefore, in violation of the prohibition against unjust or unreasonable discrimination in rates prohibited by 47 U.S.C. § 202. *Nader v. F.C.C.*, 520 F.2d 182 (D.C. Cir. 1975). The end user charge bears no relationship to actual cost and the decision does not support any of the considerations it attempted to apply. *Ad Hoc Telecommunications Users Committee v. F.C.C.*, 680 F.2d 790 (D.C. Cir. 1982).

End User Charge Bears No Relation To Cost

The only justification for the imposition of the uniform end user access charge is the dubious distinction of ease of administration.

Each utility must justify its rates based upon its individual expense characteristics and the costs of debt and equity capital it has received in the market. Local rates are different for like communications services around the country and within any state. In Greenwich, Connecticut, a subscriber pays $16.88 for local service. A two dollar per month increase in that service amounts to only an 11.8

% increase in rates.[12] In Florida for like communications services, in Miami, a ratepayer with Southern Bell can expect to pay $12.20 per month[13] for local exchange service[14] while a ratepayer with the United Telephone Company in Boca Grande, will pay $4.73 per month[15] for local service. One of the considerations besides costs and investment is calling scope and telephone densities. By applying a uniform end user access charge to both of these like communications services without regard to differences in cost, the FCC has imposed a discriminatory rate increase on local rates without any jurisdiciton, save its own agency's convenience. *American Broadcasting Co., Inc. v. F.C.C.*, 663 F.2d 133 (D.C. Cir. 1980).

For the New York Telephone Company ratepayer a $2 per month increase amounts to a monthly increase of 11.8% in local rates, whereas for the United Telephone Company ratepayer it amounts to a 42.3% increase in local rates. There is no relationship between these percentage increases and costs associated with the provision of like communications services.

The state agencies, charged with the responsibility of setting local rates (by both state and federal statutory authority), properly consider these and other factors in

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[12] New York Telephone Company, Compliance Tariff filing, October 22, 1984, § 1, 2d rev. p. 1. At other locations within Connecticut, local rates vary as well. In Ansonia, Connecticut, the charge for local service is $9.81 and for Hartford, the same service is $12.40. Southern New England Telephone Company Tariffs, Part X, § 2, sheets 2 & 7, respectively.

[13] Southern Bell Telephone Company Tariff A3.4.2B, pp. 12-16 – Miami, Homestead, North Dade and Perrine, Florida.

[14] The analogous situation exists for the multiline business access charge now in effect.

[15] United Telephone Company Tariff A3.C.2., pp. 10 & 11 – Boca Grande, Everglades and Moore Haven, Florida.

allocating the costs of the provision of that service to the cost causers. The costs of providing local service vary with location and with each company providing the service.[16] Even within companies, the costs vary between locations served. The FCC is having difficulties in setting equitable end user access charges simply because it does not have, nor could it ever expect to have, the knowledge and information available to the state regulatory agencies for the setting of equitable local rates. The FCC acknowledges that it requires the technical assistance of the state regulatory commissions to assist in setting the returns on equity for the more than 1400 exchange telephone companies.[17] Yet in this proceeding, the agency is affecting the tens of thousands of local rates involved for each of these same 1400 local telephone companies. The agency assumes inconsistent positions to suit its convenience. Further, in this same request for comments on the rate of return, the

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[16]The calculation and allocation of costs is complicated by the age of the financial and physical investments as well as calling areas. For example: In Florida, for ALLTEL, Tariff A3.3.1 pp. 3 & 4, in Ft. White with a calling scope of 6,411 phones, the monthly local charge is $9.20. For United Telephone Company, Tariff A3.C.2. pp. 10 & 11, in Sebring with a calling scope of 14,535 phones, the local rate is $5.65. Hence, it is readily apparent that there are no direct or simple relationships between costs and local service.

[17]In its *Notice of Proposed Rulemaking* in CC Docket No. 84-800, FCC 84-395, the following statement appears:

> "4. But, these changed conditions potentially create an administrative quagmire for the industry and for this agency. We do not have the resources to conduct over 1,400 rate proceedings on a company-by-company basis with oral hearings frequently enough to keep up with changing financial and industry circumstances. (Notice of Proposed Rulemaking: Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers, 49 Fed. Reg. 32,871 (1984))."

agency asks for the remedy which the States are advocating in this case.[18]

Realizing that the agency could not determine the returns on equity for the 1400 local companies, the FCC is seeking help from the States. When it attempts to allocate local costs associated with the local loop, the FCC ignores the States and implements a rate structure for its own convenience having no relation to cost, rebuffing the States' expertise and resources. It is dismaying to note that when the issue is the accuracy of a company's return on equity, the FCC is concerned with surgical precision, but when the issue deals with the customers' rates, the FCC is instead, content with ease of administration.

It is not that the FCC has intentionally sought to deny local ratepayers equal protection of the law. It has stated a policy that the costs should be borne by the cost causers. The agency is, however, without the jurisdiction, the expertise and the industry to obtain the necessary local cost figure to assess who is the cost causer and assign the appropriate rates to those costs. What the agency has instead done is arbitrarily assign "costs" through a formula approach, by the use of an arbitrary allocation factor[19] uniformly across all local ratepayers without regard to actual cost. The reason for this action is the ease of administration and not a concern for costs. It is for just such a reason that the rationale of the *Smith* decision is still good law. It makes sense that the federal government should exercise its jurisdiction to oversee the assignment

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[18]"Commenters may suggest methodologies different than a formula approach, *such as use of the rates of return allowed by state commissions. See MTS and WATS Market Structure, supra,* 93 F.C.C.2d at 316, n. 102." *Id.* at 32,871.

[19]See Note 17.

of costs between jurisdictions, but it then should fall upon the state regulatory agencies to allocate those local costs to local ratepayers based upon the local cost characteristics for each location and local exchange company.

> "One of the dangers of extraordinary experience is that those who have it may fall into the grooves created by their own expertness. They refuse to believe that hurdles which they have learned from experience are insurmountable can in fact be overcome by fresh, independent minds."[20]

The states have the expertise, the jurisdiction and the resources to allocate local costs appropriately to local ratepayers.

Smith has as its basis, the allocation of property between interstate and intrastate services based upon the actual use to which the property was put. The FCC has now changed that standard with the Circuit Court's acquiescence. The FCC has failed to even assert that there is any reasonable basis for apportionment of the cost associated with access and the across-the-board flat-rate end user access charge.

Here it is acknowledged by the FCC, that its allocation of the local exchange costs through the use of an end user access charge is arbitrary, but that the system is too complicated for precise determination. One cannot give deference to an agency decision when that decision is patently discriminatory and has the fundamental consequence of undermining any assurances that there will be universal telecommunications services as mandated by the Communications Act of 1934.

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[20]Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 64 Harv. L. Rev. 436, 471 (1954), citing from Judge Wyzanski.

The FCC's Decision Is Not Supported By Espoused Policy Considerations

In deciding to authorize a uniform end user access charge, the FCC allegedly considered four factors which it espoused in its order authorizing the charge. It contended that:

1. Its decision would continue to assure the availability of universal service (at affordable prices);
2. the imposition of its decision would eliminate unjust discrimination or preferential rates;
3. an end user charge would encourage network efficiency; and
4. prevent uneconomic bypass of the local exchange network.

Access Charge Order, para. 122, 93 F.C.C.2d at 278.

The Commission's decision does not support any of the considerations it attempted to apply. As such, the imposition of the customer access line charge in this case constitutes arbitrary agency action which is violative of equal protection for the consuming public and in direct conflict with the provisions of the Communications Act of 1934.

1. The charge is regressive and does not continue to assure the availability of universal service.

Fundamentally, the decision to impose an end user charge increases local rates and is in the nature of a regressive charge affecting those customers least able to pay the charge, the residential customer. Any flat rate increase in taxes or charges has a regressive effect on the small user, the poor and those least able to afford alternatives. See: *Geduldig v. Aiello,* 417 U.S. 484, 493 (1974).

Thus, the goal of continuing to assure universal service is not achieved by the FCC's choice.

2. The end user access charge is patently discriminating.

A flat rate increase, suggested by the FCC has disproportionate effects on different ratepayers. As demonstrated earlier, for some ratepayers the increase in rates would be 11.8%, whereas, the same flat rate increase could be as high as a 42% increase. The increase would have no basis nor support from the cost of providing the service. Therefore, the rate is patently discriminatory. Rates can be discriminatory, but the discrimination in rates must have some factual justification. *Nader, supra,* at 201. The only justification advanced by the FCC is that the agency cannot justify the differential based on costs, so it has taken the approach of ease of administration. As such, the agency has violated 47 U.S.C. § 202(a).

3. End user charge encourages bypass.

To understand how a flat rate end user charge discriminates against the small user and encourages bypass, it is necessary to consider demand elasticity. As the cost for a service increases, the demand for that service declines. The more the service is in the nature of a necessity, the less the demand will decline. However, as the cost for the service increases, the availability of alternatives to that service becomes more economically competitive, and, thus, viable alternatives.

A classic example of such a bypass phenomenon is the case of cable television service. The availability of cable services in remote or primarily rural areas simply is not cost justified and, consequently, not available. As a result,

alternative services are available through the purchase of satellite dish antennae. A rural homeowner will bypass the high cost of rural cable service or the lack of rural cable services by investing in bypass technology. Once the rural resident invests in a dish antenna, each month he avoids paying for cable service he is, in effect, getting a return on his investment in that dish. Once he "recovers" the cost of the dish, he continues to avoid paying for comparable cable service. This avoidance of paying for service is effectively a return on his investment.

Once a subscriber of local telephone service invests in bypass technology, he is no longer interested in using or returning to local service.

As the costs of local service go up, large users are encouraged to seek economically justifiable alternative services. Since phone service is in the nature of a necessity, large users look to alternatives because they have an economic incentive to bypass the local network.

> Under the FCC's plan to shift most subscriber plant costs in the interstate jurisdiction onto end users, a $6 end user charge will be imposed on multi-line business customers starting in June 1984.

NARUC v. F.C.C., supra, at 1109.

The current state of technology offers the hardware for that bypass and the FCC offers them the economic incentive to purchase that equipment.

4. The FCC's decision idles the system and encourages inefficiency.

As large users purchase bypass equipment and abandon the local network, there is not a corresponding decrease in

the facilities required to maintain a local exchange network. Those fixed facilities require a return on investment through depreciation expense and a return on that investment to compensate investors for their bearing the risk of originally building those systems. In addition, those systems must be maintained so that any person seeking to avail himself of those services has the opportunity to do so. The result is to allocate these fixed costs, or as the FCC termed these costs, non-traffic sensitive costs, to fewer customers. When you allocate a fixed level of costs to fewer customers local rates must go up. As fewer and fewer customers bear the cost of maintaining the local exchange system, local rates are again forced up. This ultimately endangers the very existence of the local exchange network. The residential consumer has no economically justifiable alternative to the provision of local exchange services. This unjustified discrimination in rates is the auto-da-fé of universal service.

The irony of the Commission's decision lies in the interplay of local and long distance rates. The Commission's decision would reduce long distance rates and increase local rates. Increasing the cost of the provision of local service will discourage the use of the service necessary to access the long distance service. This discouraging result is in direct derogation of the Communications Act and the FCC's responsibility mandated by the Act. The Commission's decision simply encourages network inefficiency.

The FCC Has Acknowledged That the Charge May Not Accomplish Goals

The FCC and the Court acknowledge that the flat rate end user charge may not accomplish the intended goals; however, the charge will, nonetheless, be imposed.

The Commission would have this Court believe that the four enumerated criteria for the setting of this end user access charge should govern as some form of overriding national policy. The states on the other hand believe that they are in a better position to set rate structures on a local basis carrying out the national policy of protecting universal service. Rate structure has been and continues to be a matter of great local interest.

The technology of bypass is certainly a national technology. However, the application of that technology to individual concerns is a matter of local interest and each decision to bypass or not to bypass is based upon local economic interests. It is these local economic interests which state regulatory agencies grapple within each rate case. The Commission has acknowledged that it is unsure that the remedy it has imposed and deferred imposing may not be the best solution and that further study is necessary. The reason that the problem is so complex is that the problem is local in nature requiring surgical precision in fashioning a remedy that has intricate complexity. Thousands of local rates and rate structures will be irreversibly altered if the FCC is allowed to interfere with local rate structures. This Court should accept jurisdiction.

The FCC Justification For Its Action Is Misplaced

The Commission would probably attempt to justify this intrusion on the authority of *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976). In *NCUC*, the Commission deregulated the charges for customer-provided equipment and the interconnection of that equipment to the nationwide communications network. The regulation of that equipment was restricted exclusively to intrastate communications and, as such, ostensibly outside the jurisdic-

tion of the FCC. The Court found that the interconnection with telephone company equipment affected access to the interstate telephone system and was a permissible exercise of the Commission's jurisdiction under 47 U.S.C. § 201(a). The Court stated that when there are inconsistent policies between the state and federal regulatory agencies and when the federal policies did not interfere with the integral operations of the state government (state's rights argument), the policy was exercisable under the federal commerce power. The Court found in *NCUC* that the use of terminal equipment was indistinguishable for the provision of interstate or intrastate calls. Here the costs are admitted by all to be local in nature and are, therefore, *distinguishable* from the costs associated with the provision of interstate calls.

In *NCUC,* the FCC was instituting a national policy that was predicated on the fact that terminal equipment had established itself as a competitive market. It was no longer in the public interest to expend public funds to regulate the sale of terminal equipment. The FCC was not imposing a rate increase, but was in fact removing state and federal rate regulatory authority from the sale and leasing of terminal equipment. Contrasted with this case, the FCC is imposing rate regulation on all customers of local intrastate telephone service without regard to the differences in costs and types of services offered in the thousands of service areas around the country. The FCC is imposing a flat, across-the-board increase without regard to its own limitation on jurisdiction and expertise and without any overriding national policy. There is no national policy favoring a discriminatory rate increase for subscribers of local service.

There is a significant distinction between the exercise of authority implicitly within the mandates of 47 U.S.C. §

201(a), and exercise of authority which amounts to usurpation of authority acknowledged by this Court to exist in the States.

CONCLUSION

The Federal Communications Commission has designed an "end user access charge" to be applied on all local ratepayers. The effect of this charge is to increase local rates for consumers regardless of whether they use interstate service or restrict their usage of the phones to local service. The action of the FCC is in excess of the Commission's authority and, as such, constitutes an *ultra vires* act not cognized in the Communications Act of 1934, at 47 U.S.C. §§ 201(a) & 205.

The Federal Communications Commission in acting in an *ultra vires* manner, has imposed local rate increases which are discriminatory and, as such, violate the prohibition against discriminatory rates found in 47 U.S.C. § 202. The action endangers the continued availability of universal service.

Respectfully submitted,

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DATED: November 21, 1984

APPENDIX A

STATUTES & REGULATIONS

47 U.S.C. § 151

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 201(a)

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such

charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. § 202

(a) Prohibition of unjust or unreasonable discrimination. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 221(b)

(b) State jurisdiction over service. Subject to the provisions of section 301 [47 USCS § 301], nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

APPENDIX B

FLORIDA STATUTES

364.03 Rates to be reasonable; performance of service; maintenance of facilities and equipment.

(1) All rates, tolls, contracts, and charges of, and all rules and regulations of, telephone companies for messages, conversations, services rendered, and equipment and facilities supplied, whether such message, conversation, or service is to be performed over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable, and sufficient, and the service so to be rendered any person by any telephone company shall be rendered and performed in a prompt, expeditious, and efficient manner and the facilities, instrumentalities, and equipment furnished by it shall be safe and kept in good condition and repair and its appliances, instrumentalities, and service shall be modern, adequate, sufficient, and efficient.

(2) Every telephone company operating in this state shall provide and maintain suitable and adequate buildings and facilities therein, or connected therewith, for the accommodation, comfort, and convenience of its patrons and employees.

(3) Every telephone company shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communications and furnish telephone service as demanded upon terms to be approved by the commission.

364.035 Rate fixing; criteria service complaints.

(1) In fixing the just, reasonable, and compensatory rates, charges, fares, tolls or rentals to be observed and charged for service within the state by any and all telephone companies under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered, including energy conservation and the efficient use of alternative energy resources; the value of such service to the public; and the ability of the telephone company to improve such service and facilities; except that no telephone company shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings. In its consideration thereof, the commission shall have authority, and it shall be the commission's duty, to hear service complaints, if any, that may be presented by subscribers and the public during any proceedings involving such rates, charges, fares, tolls, or rentals; however, no service complaints shall be taken up or considered by the commission at any proceedings involving rates, charges, fares, tolls, or rentals unless the telephone company has been given at least 30 days' written notice thereof, and any proceeding may be extended, prior to final determination, for such period; and, further, no order hereunder shall be made effective until a reasonable time, considering the factor of growth in the community and availability of necessary equipment, has been given the telephone company involved to correct the cause of service complaints.

(2) The power and authority herein conferred upon the commission shall not cancel or amend any existing punitive powers of the commission but shall be sup-

plementary thereto and shall be construed liberally to further the legislative intent that adequate service be rendered by telephone companies in the state in consideration for the rates, charges, fares, tolls, and rentals fixed by the commission and observed by the telephone companies under its jurisdiction.

364.05 Changing rates, tolls, rentals, contracts, or charges.

(1) Unless the commission otherwise orders, no change shall be made in any rate, toll, rental, contract, or charge which has been filed and published by any telephone company in compliance with the requirements of s. 364.04, except after 60 days' notice to the commission and the publication for 60 days as required by that section in the case of original schedules, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rate, toll, rental, contract, or charge will go into effect. All proposed changes shall be shown by printing, filing, and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection.

(2) The Commission, for good cause shown, may allow changes in rates, tolls, rentals, contracts, or charges without requiring the 60 days' notice and publication herein provided for by an order specifying the change so to be made, the time when it shall take effect, and the manner in which the same shall be filed and published.

(3) When any change is made in any rate, toll, rental, contract, or charge, the effect of which is to increase any rate, toll, rental, contract, or charge then existing, attention shall be directed on the copy filed with the commis-

sion to such increase by some character immediately preceding or following the item in such schedule, which character shall be in such form as the commission may designate. No change shall be made in any rate, toll, rental, contract, or charge prescribed by the commission without its consent.

(4) Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the telephone company requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to may, at the option of the company, go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such telephone company to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such telephone company to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the telephone company shall be refunded or disposed of by the telephone company as the commission may direct; however, no such funds shall accrue to the benefit of the telephone company. The commission shall take final commission action in the docket and enter its final order within 12 months after the commencement date for final agency action. As

used in this section, "commencement date for final agency action" means the date upon which it has been determined by the commission or its designee that the telephone company has filed with the clerk the minimum filing requirements as established by rule of the commission. Within 30 days after receipt of the application, rate request, or other written document for which the commencement date for final agency action is to be established, the commission or its designee shall either determine the commencement date for final agency action or issue a statement of deficiencies to the applicant, specifically listing why the applicant has failed to meet the minimum filing requirements. The statement of deficiencies shall be binding upon the commission to the extent that, once the deficiencies in the statement are satisfied, the commencement date for final agency action shall be promptly established as provided in this section. Thereafter, within 15 days after the applicant indicates to the commission that it believes that it has met the minimum filing requirements, the commission or its designee shall either determine the commencement date for final agency action or specifically enumerate in writing why the requirements have not been met, in which case this procedure shall be repeated until the commencement date for final agency action is established. When the commission initiates a proceeding, the commencement date for final agency action shall be the date upon which the order initiating the proceeding is issued.

364.14 Readjustment of rates, charges, tolls, or rentals; hearing; order compelling facilities to be installed, etc.

(1) Whenever the commission finds, upon its own motion or upon complaint, that the rates, charges, tolls, or

rentals demanded, exacted, charged, or collected by any telephone company for the transmission of messages by telephone, or for the rental or use of any telephone lines; any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance, or device; or any telephone extension or extension system, or that the rules, regulations, or practices of any telephone company affecting such rates, charges, tolls, rentals, or service are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law, or that such rates, charges, tolls, or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order as hereinafter provided. In prescribing rates, the commission shall allow a fair and reasonable return on the telephone company's honest and prudent investment in property used and useful in the public service.

(2) Whenever the commission finds that the rules, regulations, or practices of any telephone company are unjust or unreasonable, or that the equipment, facilities, or service of any telephone company are inadequate, inefficient, improper, or insufficient, the commission shall determine the just, reasonable, proper, adequate, and efficient rules, regulations, practices, equipment, facilities, and service to be thereafter installed, observed, and used and shall fix the same by order or rule as hereinafter provided.